July 1. 1746.

INFORMATION

FOR

James Beatſon of *Glaſmount*, Defender,

AGAINST

David, Iſabel, Anne, Margaret, *and* Elizabeth Beatſons, *Purſuers.*

AMONG the unhappy People who countenanced the Rebellion 1715, Doctor *William Beatſon*, eldeſt Son to *Beatſon* of *Souther-Glaſmount*, was ſuſpected to be one; he never was in Arms, but it is probable, from his ſtealing out of the Country for ſome time, that he has not been ſo guarded in his Behaviour upon that Occaſion, as to ſtand a legal Challenge. His Father *James Beatſon*, by this Time turning old, and willing, as he expreſſes it, to tranſmit to his Poſterity his Fortune and Eſtate, contrived a Settlement, ſo as to give his Eſtate to his eldeſt Son, in caſe he ſhould be in a Capacity to hold the ſame, otherwiſe to paſs him by, and to ſettle it upon his younger Children.

He executed this Purpoſe in the following Manner: A Diſpoſition is made out of the Lands of *Souther-Glaſmount*, &c. in favours of *Robert Beatſon* his ſecond Son, and the Heirs-male of his Body, which failing, to his other Sons in their Order, reſerving the Granter's Liferent of the ſame, and a Power to alter; and obliging the ſaid *Robert Beatſon*, and, failing of him and his Iſſue-male, any other Son who ſhould ſucceed by this Deſtination, to pay to each of the Granter's younger Children the Sum of 1000 Merks, at that Time in Number ſeven; and it is ſpecially provided, " That the ſaid Lands ſhall be redeemable by the Granter himſelf *etiam in ar-*
" *ticulo mortis*, or by other Perſons after his Deceaſe, to be named by him in a
" Writ under his Hand, by Conſignation of a Roſe-noble in the Hands of any Per-
" ſon, and at any Place he or the ſaid Perſons to be named by him ſhould think fit,
" and that without Neceſſity of any other Order of Redemption or Letter of Re-
" verſion for that Effect, and without the Neceſſity of regiſtering the ſaid Writ,
" which is thereby diſpenſed with." 3d *July* 1716.

Of even Date with the Diſpoſition *James Beatſon* of *Souther-Glaſmount* " no-
" minated and appointed *William Beatſon* Doctor of Medicine, his eldeſt Son, and
" the Heirs-male or female of his Body, and *Andrew Anderſon* Brewer in *Leith*,
" and failing of him by Deceaſe, *William Jamieſon* Merchant in *Edinburgh*, to
" be the Perſons by whom the ſaid Lands ſhould be redeemable, after the Diſponer's
" Deceaſe, for the Uſe and Behoof of the ſaid *William Beatſon* and the Heirs of
" his Body, and that by Conſignation of a Roſe-noble in the Hands of *Robert*
" *Beatſon* of *Vicars-Grange*, or in the Hands of any other Perſon, and at any
" Place the ſaid *William Beatſon*, *Andrew Anderſon* or *William Jamieſon* ſhould
" think fit, the ſaid Conſignation being always duly intimated to the Diſponees."

Soon after this Settlement was executed, the old Man died, and his Family were all of them ſo conſcious of the above Settlement's being made with no other View than to prevent the Effect of Forfeiture, without deſigning otherwiſe to break in upon the lineal Succeſſion, that there was no, not the leaſt Attempt made to take Poſſeſſion upon this Settlement; on the contrary, *Robert Beatſon* the ſecond Son, who was the Inſtitute in the Deed of Settlement, and the Doctor's Mother, took Poſſeſſion in Name of the Doctor, and they accounted to him faithfully for the Rents. The Diſpoſition, without Doubt, in the legal View, gave *Robert* a good Right to theſe

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Rents, until the Lands ſhould be redemed from him; but he was a Man of Integrity, and being perfectly well appriſed of his Father's Purpoſe, whatever Right he might have by the Figure of the Deed, he was ſenſible that in Point of common Honeſty he had no Title whatever.

The three Years elapſed, which afforded a Security to the Doctor to return to his native Country; he came home, and, without regarding the above Settlement, which was now no longer of Uſe, and renounced by him, he entred to the Poſſeſſion of his Father's Eſtate, and continued in the Poſſeſſion, upon the Title of his Apparency, until his Death in the Year 1740, only ſerved himſelf Heir in general to him.

Though it is likely the Doctor did not conceive himſelf bound by Law to acknowledge the Proviſion made in the above Settlement for his Brothers and Siſters, yet he paid Part of the Sums provided; and particularly, he made up Titles to a Tenement in *Kinghorn*, which belonged to his Father, and made over the ſame to his Brother *Robert*, becauſe it appeared by a Deed lying by his Father the Time of his Death, that he intended this Subject to *Robert*, in caſe his eldeſt Son ſhould return to his native Country, and be capable of holding the Eſtate.

The Doctor having died without Iſſue, his Nephew *James Beatſon*, eldeſt Son of *Robert*, took up the Poſſeſſion, as Heir apparent to his Grandfather of the ſame Name, who died laſt veſt and ſeaſed; but the Doctor having left a conſiderable moveable Eſtate behind him, the ſame devolved upon his Brothers and Siſters who ſurvived him.

The Doctor was abundantly kind to his Brothers and Siſters, and ſuch of them as were unmarried received at different Times Money from him, four of them, *David*, *Margaret*, *Janet* and *Elizabeth*, whoſe Portions he had not fully paid up, and the preſent Proceſs is at their Inſtance, for Payment of their own Portions, and for their Shares of *John*'s Portion, who died before his Brother, againſt the preſent *James Beatſon* of *Souther-Glaſmount*, concluding Payment of the Proviſions appointed to them by the above Deed of Settlement. The Lord *Murkle* Ordinary is to report the Point upon Informations, and in obedience to his Interlocutor this Information in behalf of the Defender is humbly offered.

The Purſuers Claim is founded upon the above Deed of Settlement, containing abſolute Warrandice by the Granter, they plead, that the Defender, as repreſenting his Grandfather the Granter, is bound to make up his Titles by this Deed of Settlement, to bruik the Eſtate by it, and no other Title, and conſequently to pay the Proviſions contained in that Settlement. 2*do*, At any Rate that the Granter intended theſe Proviſions to be effectual to his Children, and that his Heirs ſhould pay the ſame, *Robert*, in caſe the Eſtate ſhould belong to him by the Diſpoſition, and the Doctor, in caſe he ſhould be *in poteſtate* to redeem the ſame.

To the *firſt* it is anſwered, 1*mo*, That it is moſt obvious, not only from the Deed itſelf, but from the Behaviour of the whole Family, that it never was intended to anſwer any other End than to protect the Eſtate from Forfeiture; and therefore, as the Circumſtances of the Caſe render this Caution unneceſſary, the Succeſſion muſt be look'd upon, *quoad* the Succeſſion of the Heirs, as if it never had been made, whatever Conſideration may be had of it as to the younger Childrens Proviſions, of which afterwards in anſwering the ſecond Ground. 2*do*, It is very true, there is in this Deed an Obligation in common Form upon the Granter to infeft *Robert* the ſecond Son, *&c.* but this Obligation is not conceived in favours of the Purſuers, who pretend no Right to the Eſtate, ſuch an Obligation at the ſame time, in a ſimple Deſtination like the preſent, cannot be founded upon even by a Subſtitute; the Reaſon is obvious, For he can have no legal Intereſt to oblige the Heir to make up his Titles upon a ſimple Deſtination, which is alterable by him at Pleaſure. 3*tio*, Were this Settlement to be conſidered as an effectual Deed, to implement which the Defender is bound as repreſenting his Grandfather, the Conſequence muſt be, that the Doctor had no Right to the Eſtate, ſince it is not ſaid that ever he uſed the Order of Redemption. Upon this Footing he was liable to account to his Brother *Robert* the Diſponee for the whole Rents intromitted with by him. This Claim is competent to the Defender in the Right of his Father *Robert*, and the Purſuers are liable to him for the ſame, to the Extent of the Doctor's moveable Succeſſion devolved upon them, which will do more than compenſate the Sums purſued for.

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The ſecond Point has a greater Appearance of Foundation, and it muſt be yielded, that if the Maker of the Deed of Settlement had bound himſelf to pay theſe Proviſions, the Defender, as repreſenting him, muſt have been liable; or if he had bound his eldeſt Son the Doctor; for in that Caſe the Defender muſt have laid his Account to be liable upon the Act 1695. when he ſhall make up Titles to the Eſtate by paſſing by the Doctor. But neither of theſe Things are done. The Burden of theſe Proviſions is only laid upon ſuch of his younger Sons, who, by Acceptance of the Diſpoſition, ſhall enjoy the Eſtate. Now the Fact is, that none of the younger Sons accepted of the Diſpoſition; ſo that even they are not ſo much as liable, far leſs the Granter or his Heirs of Line. It is not ſeen upon what Foundation the Doctor himſelf could have been made liable, had he even acknowledged this Diſpoſition, by uſing the Order of Redemption preſcribed therein; for there is no ſuch Clauſe in either of the Deeds, as tends to make him liable for theſe Proviſions, in caſe of his uſing the Order of Redemption. And indeed when the Matter is conſidered in the moſt favourable Light for the Purſuers, it does not appear to have been the Intention of the Father to load his eldeſt Son, his Heir at Law, with theſe Proviſions, but only his ſecond and following Sons, in caſe his eldeſt Son ſhould be excluded from the Succeſſion. The Eſtate is but a ſmall one, not exceeding 1000 Merks of yearly Rent, upon ſuch an Eſtate 7000 Merks is a great Burden, and the younger Children might have been provided out of the Executry or other Funds; and it is not unuſual in Gentlemen of ſmall Fortunes, who have a Vanity in keeping up their Family, to preſerve all to their eldeſt Son, leaving the younger Children to their Shifts. Such a Humour does not deſerve to be approved of, but as there is nothing illegal in it, Judges will not take upon them to make a Settlement for any Man different from what he makes for himſelf.

But in the *ſecond* Place, ſuppoſing the Father had intended that his Childrens Proviſions ſhould be effectual in all Events, and holding, for Argument's Sake, this ſuppoſed Intention to be equivalent to an Obligation upon himſelf and his Heirs, the Defender upon theſe Suppoſitions muſt yield, that theſe Proviſions are a Charge againſt him; but then he can diſcharge himſelf by ſhowing, that the Purſuers have Payment in their own Hands. Theſe Proviſions are evidently a moveable Claim; they are not made a Burden upon the Right; no more is done but to oblige the Accepters of the Diſpoſition to pay the ſame. The Fund for Payment of theſe Proviſions then is the Granter's Executry, and the Executry of his eldeſt Son the Doctor, who, by the Suppoſition, came to be liable as repreſenting his Father the Granter. It is true, a moveable Creditor has his Option to purſue either the Heir or Executor; but if he himſelf is Executor, and his Payment in his own Hand, he has no Claim againſt the Heir. This is the preſent Caſe. The Purſuers are Executors to their Brother the Doctor, and have actually intromitted with his Moveables, the Defender ſays, to a greater Extent than will ſatisfy the Sums purſued for; but whether or not, the Purſuers cannot at any Rate draw any Sum from the Defender, till they firſt account for the Doctor's Executry, which is the proper Subject of their Payment; and not pretend to take away the Doctor's Effects as Executor, and burden the Lands with their Proviſions.

In reſpect whereof, &c.

HENRY HOME.